Supreme Court, U.S.
FILED
NOV 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-621

In The

Supreme Court of the United States

OCTOBER TERM, 1988

TOWN OF RYE, NEW HAMPSHIRE,

Petitioner,

v.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
AND
THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION
AND
TOWN OF HAMPTON FALLS, NEW HAMPSHIRE

Respondents.

BRIEF OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

MARTIN L. GROSS
(Counsel of Record)
MARGARET H. NELSON
SULLOWAY HOLLIS & SODEN
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302
(603) 224-2341
Counsel for Respondent
Public Service Company of
New Hampshire

November 9, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether this Court should allow the Petitioner to seek certiorari on the basis of a federal question which the Petitioner failed to raise before the state court?

2. Whether a state court's interpretation of a state pole licensing statute raises a substantial federal question where the state court's decision did not impair or affect any rights which the Petitioner had under the Atomic Energy Act?

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STATEMENT OF THE CASE

This Petition for a Writ of Certiorari arises from a decision of the New Hampshire Supreme Court interpreting a New Hampshire statute, N.H. Rev. Stat. Ann. § 231:160 *et seq.* (1982), governing placement of utility facilities on State and locally maintained highways.

In conformance with this statute, Public Service Company of New Hampshire ("PSNH") submitted applications for pole licenses to the Petitioner to install certain poles bearing sirens designed to meet PSNH's obligations to provide a public alerting and notification system within a ten mile radius of the Seabrook Nuclear Generating Station, a nuclear generating facility owned by PSNH and other New England utilities. 10 C.F.R. § 50.47(b)(5). It was undisputed that the applications had been submitted following a meeting of the Petitioner's Board of Selectmen at which Bruce Beckley, PSNH's Manager of Nuclear Projects, had fully described the purpose of the proposed siren poles. Simultaneously, PSNH also sought permission from the State of New Hampshire ("the State") to erect similar siren poles on State-maintained highways within the geographical boundaries of the Petitioner.

The Petitioner issued pole licenses to PSNH authorizing PSNH to install siren poles along highways maintained by the Petitioner. The State also gave PSNH permission to erect siren poles on State-maintained highways. PSNH proceeded to install the siren poles. Only at that juncture did the Petitioner seek to revoke the licenses it had previously granted to PSNH.

When PSNH declined to remove the siren poles on the grounds that the Petitioner had not alleged a proper

basis for revocation under state law, the Petitioner commenced a declaratory judgment petition in the New Hampshire Superior Court, seeking an order that it was authorized to revoke the pole licenses under state law.

The Town of Hampton Falls, New Hampshire intervened to challenge the placement of siren poles by PSNH on State-maintained highways in that community. Following hearings, the trial court ordered that the State become a party.

The trial court ruled that the siren poles did not come within the class of utility facilities authorized to be placed on State and local highways by N.H. Rev. Stat. Ann. § 231:160 et. seq. (1982) and ordered their removal.

PSNH and the State appealed the trial court's order to the New Hampshire Supreme Court ("the State court") which held as a matter of state law, siren poles did fall within the embrace of the pole licensing statute. Furthermore, the State court found that the Petitioner had advanced no appropriate safety-related justification for its purported revocation within the meaning of the statute.

Following denial of its Motion for Reconsideration, the Petitioner brought this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Petitioner is not entitled to the extraordinary remedy of a Writ of Certiorari. First, the Petitioner failed to raise before the State court the issue which it now wishes this Court to review. Second, the State court's

interpretation of the New Hampshire pole licensing status is not repugnant to or consistent with federal law. The State court's decision defined the parameters of the Petitioner's rights under state law. The Petitioner cannot seek to use a doctrine of limited federal pre-emption in the field of civil nuclear power production to vest it with rights which are unavailable under state law. Therefore, there is no substantial federal question warranting this Court's review.

REASONS FOR DENYING THE WRIT

A. THE ISSUE RAISED BY THE PETITIONER WAS NOT RAISED BELOW.

The settled practice of this Court is not to consider, except in highly unusual circumstances, questions which were not raised before the State court. *Tacon v. Arizona*, 410 U.S. 351 (1973); *Edelman v. California*, 344 U.S. 357 (1953). This rule extends to the federal question which the Petitioner raises for the first time here.

An examination of the Petitioner's brief to the State court in this matter (reproduced herein as Appendix A) demonstrates that the Petitioner failed to argue to that court that interpreting New Hampshire's pole licensing statute to allow installation of the disputed siren poles would be repugnant to the Atomic Energy Act, in particular, 42 U.S.C. § 2021(k).

While the Petitioner may argue that its Motion for Reconsideration of the State court's decision (reproduced herein as Appendix B) did cite at least one federal authority now relied upon to support its request for a writ of

certiorari, even at that stage of the proceeding, the Petitioner failed to articulate its present claim of a federal right to assert local regulatory authority.

In some exceptional circumstances, this Court has held that an issue may be preserved for this Court's review even if raised for the first time in post-judgment motions where the issue could not fairly have been anticipated before the State court's decision. *See, e.g., Herndon v. Georgia*, 295 U.S. 441 (1935). However, in the present case, the Petitioner cannot fairly claim that it could not have anticipated a federal question prior to the State court's decision because the Petitioner had to have known that an order in favor of PSNH and the State's interpretation of the statute would affect its authority to compel removal of the poles.

Therefore, even if the Petitioner's Motion for Reconsideration could be read to set forth its present claim, it should be considered untimely and insufficient to preserve the question for this Court's review.

B. THE PETITIONER HAS FAILED TO PRESENT ANY FEDERAL QUESTION WARRANTING THIS COURT'S REVIEW.

28 U.S.C. § 1257(a) permits this Court to review final judgments of the highest court of a state where:

> [T]he validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or

statutes of, or any commission held or authority exercised under, the United States.

This Court's jurisdiction under this statute is not that of general appellate review but is limited to specific instances of denials of federal rights. *Duncan v. Tennessee*, 405 U.S. 127 (1972); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909). Any federal question presented must be substantial and where there is no foundation in the record for the federal question purportedly giving rise to this Court's jurisdiction, the Petition must be dismissed. *Ennis Water Works v. Ennis*, 233 U.S. 652 (1914); *Swafford v. Templeton*, 185 U.S. 487 (1902).

The Petitioner's request for a writ of certiorari plainly fails to meet these exacting standards. The State court decision did not impair or affect any rights which the Petitioner has under federal law. Indeed, the Petitioner's attempts to create certain federal rights are unsupported by a review of the Atomic Energy Act and this Court's decisions under that statute. Therefore, the Petition should be denied.

An examination of the grounds for the State court's decision demonstrates the fallacy of the Petitioner's claims. The State court was required to determine whether New Hampshire's pole licensing statute, N.H. Rev. Stat. Ann. § 231:160 *et seq.* (1982), applied to the installation of siren poles installed as part of a public alerting and notification system required by federal law. The State court ruled that the pole licensing statute authorized the installation of the siren poles, finding that the sirens were "attachments" within the meaning of N.H. Rev. Stat. Ann. § 231:160 (1982) and that the siren

poles were "required in the reasonable and proper operation of the business of" PSNH within the meaning of N.H. Rev. Stat. Ann. § 231:161,VI (1982).

Since the statute applied, the State court ruled that the licenses which had been issued to PSNH could only be revoked for a reason relating to "the safe, free and convenient use for public travel of the highway." N.H. Rev. Stat. Ann. § 231:168. That statutory mandate gave the Petitioner the authority to regulate only the proper location of the siren poles so as not to unduly interfere with other public uses of the highway. *Parker-Young Co. v. State,* 83 N.H. 551, 145 A. 786 (1929). Based upon its review of the record, the State court concluded that the Petitioner had articulated no legitimate safety-based justification for its purported revocation of the licenses issued to PSNH within the meaning of the statute.

Relying upon its prior decision in *Vernet v. Exeter,* 129 N.H. 34, 523 A.2d 48 (1986), construing N.H. Rev. Stat. Ann. § 107-B (1985 Supp.), the State Nuclear Planning and Response Program Act, the State court ruled that the Petitioner could not exercise veto power over the development of the State's radiological emergency response plan (RERP) under the guise of its limited authority under the pole licensing statute. The responsibility for development of a RERP lay with the State, not individual municipalities. While the statute directed the State to cooperate with the affected municipalities, cooperation did not mean that municipalities had the right to approve all aspects of the State's RERP. *Vernet v. Exeter, supra.*

This Court has long recognized that a state court of final appellate jurisdiction, such as the New Hampshire

Supreme Court, is the final authority on issues of state law. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Murdock v. City of Memphis*, 87 U.S. 590 (1874). Accordingly, the State court's decision defined the scope of the Petitioner's rights under prevailing state law.

The Petitioner seeks to avoid the effect of the State court's decision by claiming that the decision was in some way inconsistent with the Atomic Energy Act, 42 U.S.C. § 2021(k) which provides:

> *State Regulation of Activities for Purposes Other Than Protection Against Radiation Hazards.* Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protections against radiation hazards.

This attempt must fail as the State court decision cannot be fairly read to limit any rights the Petitioner has under the Atomic Energy Act.

This Court has ruled that under the Atomic Energy Act, the federal government has exclusive authority to regulate the radiological safety aspects involved in the construction and operation of a nuclear plant. However, the states retain their traditional regulatory responsibilities which are not inconsistent with the federal government's paramount jurisdiction over radiological safety. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983).

The Petitioner's present claims misconstrue the effect of the limitations upon federal pre-emption expressed in 42 U.S.C. § 2021(k) and further articulated by this Court in *Pacific Gas, supra*. Indeed, *Pacific Gas* makes it plain

that 42 U.S.C. § 2021(k) operates only to limit the pre-emptive effect of federal law and does not represent an affirmative grant of power to the states. *Id.* at 210. Thus, the Petitioner cannot seek to override an interpretation of state law by the highest state court by its reliance on the Atomic Energy Act.

Indeed, the authorities relied upon by the Petitioner do not support its argument. Those cases involve circumstances where the Atomic Energy Act or other federal law has been held not to pre-empt certain rights granted by state law, but these authorities do not go so far as to create rights or privileges over and above those created by state law. *See, e.g., Silkwood v. Kerr-McGee Corp,* 464 U.S. 238 (1984) [holding that an award of punitive damages under state tort law was not pre-empted by the authority vested in the Nuclear Regulatory Commission by the Atomic Energy Act]; *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk,* 604 F.Supp. 1084 (E.D.N.Y., 1985), *aff'd,* 813 F.2d 570 (2d Cir., 1987) [county legislature's refusal to participate in off-site emergency evacuation planning was not pre-empted by the Atomic Energy Act]; *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n, supra* [state statute authorizing state energy commission to determine on a case-by-case basis that there will be adequate capacity for storage of a plant's spent fuel rods as required and imposing a moratorium on new nuclear plants until the state energy commission finds that an appropriate means of disposing of such waste exists not pre-empted by the Atomic Energy Act since the statute was consistent with traditional regulatory concerns reserved to the state].

The sole issue in this case was the proper interpretation of state law. The State court held that the siren poles fell within the class of utility facilities which could be placed on State and local highways. It went on to conclude that the Petitioner had failed to demonstrate any appropriate safety-based justification for its purported revocation because there had been no showing that the poles were located in such a way as to interfere with other public uses of the highway. Moreover, the State court made it plain that the State had paramount responsibility for the formulation of nuclear emergency planning, not the local municipalities.

The blunt truth is that the New Hampshire Supreme Court, the final arbitrator of New Hampshire law, ruled that the Petitioner did not have the right under State law to prevent the installation of PSNH's siren poles within its geographical boundaries. The State court decision, in no way, affected whatever rights the Petitioner had or has to challenge the adequacy of the State's RERP before the Nuclear Regulatory Commission or through any other appropriate means. The State court's decision cannot be considered as repugnant or inconsistent with federal law. Contrary to its claims, the Petitioner is not seeking to restore the traditional balance between federal and state authority. In fact, the Petitioner, having failed to persuade the State court, is asking this Court to vest the Petitioner with certain rights which it plainly does not have under New Hampshire law. Accordingly, no substantial federal question warranting this Court's review is presented.

CONCLUSION

For the reasons stated, the Respondent, Public Service Company of New Hampshire, respectfully requests that the Petition for Writ of Certiorari be denied.

MARTIN L. GROSS
(Counsel of Record)
MARGARET H. NELSON
SULLOWAY HOLLIS & SODEN
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302
(603) 224-2341
Counsel for the Respondent

November 9, 1988

APPENDIX A TO
BRIEF OF PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE
IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI
TO THE NEW HAMPSHIRE SUPREME COURT

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

1987 TERM
AUGUST SESSION

No. 87-062

Town of Rye and Town of Hampton Falls

v.

Public Service Company of New Hampshire and
The State of New Hampshire
Department of Transportation

APPEAL FROM THE DECISION OF THE SUPERIOR COURT OF THE STATE OF NEW HAMPSHIRE TO THE STATE OF NEW HAMPSHIRE SUPREME COURT

BRIEF OF APPELLEE
TOWN OF RYE

J.P. Nadeau, Esquire
Attorney for the Appellee,
Town of Rye
Nadeau Professional Offices
507 State Street
Portsmouth, NH 03801
(603) 436-0110

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STATEMENT OF FACTS

On or about November 7, 1983, the Appellant Public Service Company of New Hampshire (hereinafter PSCNH), a private electric utility company and controlling partner in the construction of the Seabrook Nuclear Power Station, contacted the Appellee, Town of Rye, concerning the Appellant's proposal to install a public alerting and notification system within the municipality as part of an emergency evacuation plan for the Seabrook Nuclear Generating Station. The Appellant proposed to install four poles with sirens attached on state right-of-ways within the municipality and three poles with sirens on municipality owned property. From the time of Appellant's initial proposal to the present, the Appellee has consistently opposed the Appellant's proposal to install the public alerting system within the municipal boundaries on the grounds that such system is likely to be ineffective in evacuating residents and likely to create a false sense of security among town residents (Tr. 5, 17-18) (all references to transcript are to the hearing of November 13, 1986).

On July 9, 1984, the Appellant, subsequent to its initial proposal to the Appellee, submitted an application for a pole license with the Appellee's town clerk. The license application was submitted without a cover letter and without any explanation of the purpose to which the poles would be put (Tr. 22, 27, 37, 101). Subsequently, a separate application was submitted to the state of New Hampshire for poles with attached sirens to be placed on various state-maintained roads in the towns of Rye and Hampton Falls.

In September 1984, an official of the Appellee Town signed the Appellant's pole license application after it had been routinely processed and the State Department of Transportation gave its permission to the Appellant Company to install the poles. On November 7, 1985, the Appellant Company began installing four poles with attached sirens on state right-of-ways within the municipality and installed two of the three remaining poles on municipal property. The poles are approximately 60 feet in height (as opposed to a utility pole of 35 feet in height) (Tr. 90, 109-110) and affixed to the top of each pole is a 6-foot, 500-pound siren/public address system (Tr. 108, Appendix to Appeal 113) (references to Appendix are to Appendix to Notice of Appeal). These poles are used solely for a siren/public address system in conjunction with the nuclear emergency response plan for Seabrook Station. Having been notified of the appellant's intent to place these poles and sirens in different areas of the Town, the Board of Selectmen of the Town of Rye made it clear by appropriate response that it was their intention to resist any such attempt (Appendix to Appeal 113). The Appellee on November 20, 1985 issued a cease and desist order against the Appellant company's actions in installing the poles and revoked the pole license which had been issued by the Appellee to the Appellant (Tr. 47). The Appellee also advised the Appellant that the installation of any poles for the purpose of attaching sirens to the poles was unacceptable to the Appellee.

After the Appellant refused to obey the cease and desist order issued by the Appellee, the Appellee instituted an action for declaratory relief against the Appellant company (Appendix to Appeal pp. 17-19).

Specifically, the Appellee sought an order allowing it to revoke the pole license it had granted to the Appellant to install poles on town-maintained rights-of-way and also sought removal of certain poles installed within the town limits on state-maintained highways under licenses issued by the state. The Town of Hampton Falls was permitted to intervene to similarly seek removal of poles located in the town on state-maintained highways. Following a hearing on November 26, 1986, the court determined that the state of New Hampshire Department of Transportation (DOT) was a necessary party for the resolution of the dispute and ordered the DOT to file responsive pleadings (Appendix to Appeal 87-91, 112).

By order dated January 20, 1987, the superior court, Walter L. Murphy presiding, ordered removal of the poles and the siren/public address systems at the Appellant's expense within 30 days of the order (Appendix of Appeal 112-18). The sole ground on which the superior court justice based his decision was the fact that the poles and sirens in question were found not be in the class of utility facilities, installations, or structures within the meaning of *N.H.R.S.A.* §§ 231-160 et seq. In ruling in favor of the Appellee, the trial court held that the poles in question were not "telegraph, television, telephone, electric light and power poles" within the meaning of the statute. The trial court noted the exclusivity of the list of authorized uses enumerated in § 231:160 and the fact that the use of poles as part of a public emergency system was not included within the statutes's coverage. Thus the court held that the licenses granted by the Town of Rye and by the State Department of Transportation for the erection of poles for a system of public notification were

granted without statutory authority and were, therefore null and void.

SUMMARY OF ARGUMENT

The trial court was correct as a matter of law in ruling that *N.H.R.S.A.* § 231:160 did not apply to poles with attached sirens to be used as part of a public emergency system. 231:160 specifically lists, and thereby manifests an intent to limit, the types of poles to be included within the scope of the statute. Noticeably absent from the list is any reference to poles which are sought to be installed as part of a public emergency system. Furthermore, the fact that no catch-all provision is found reinforces the conclusion that the legislature clearly intended the list set forth in the statute to be exclusive. The lower court correctly applied the rule of statutory construction that the expression of one thing in a statute implies the exclusion of another. Furthermore, the statute contains no terms indicating the nonexclusivity of the list. Legislative history of *N.H.R.S.A.* § 231-160 further supports the court's conclusion that siren poles were not intended to be included within the scope of the statute.

Moreover, even if, *arguendo*, the list were not intended by the legislature to be exclusive, the poles in issue and the use to which they are sought to be put still do not fall within the scope of § 231:160. The siren poles constitute neither utility poles nor structures within the meaning of the statute. Furthermore, the sirens cannot be termed "appurtenances" within the scope of *N.H.R.S.A.*

§ 231-160. The lower court was not bound by the interpretation of § 231-160 by the Department of Transportation, as that construction is neither supported by nor in conformity with the express statutory languages. The lower court's own interpretation of the statute was not unduly restrictive.

The Appellant Public Service Company asserts a second issue that was neither raised nor litigated in the proceeding before the superior court. Allowing this issue to be raised on appeal would be error, as it would usurp the primary function of the superior court and require the Town of Rye to argue an issue not raised in the proceedings below and which did not serve as a basis for the lower court's decision. Even if, arguendo, the supreme court were to entertain this issue, the Appellant's argument is misleading as it mischaracterizes the proceedings below.

Contrary to the Appellant's assertions, the Appellee Town of Rye did not revoke or refuse to issue permits for utility installations under *N.H.R.S.A.* § 231-159, as the siren poles installed as part of a public emergency alerting system do not constitute utility facilities within the context of § 231:160. Furthermore, the Appellee's refusal to issue permits to the Appellant company was based on its objective determination that, pursuant to the proposed plan, town residents would be unable to be safely evacuated in the event of emergencies at Seabrook Station. Installation of siren poles would create a false sense of security among area residents. The Appellee's refusal to issue permits for the installation of said siren poles was a valid exercise of its well-recognized police powers. Finally, the one permit issued by the Appellee for three of

the poles in question was properly revoked because the Appellant had obtained the permit by submitting an application customarily used for the installation of ordinary utility poles, thus misleading the Appellee by concealing the fact that the pole license was being sought as part of the implementation of a nuclear emergency plan.

The third issue presented by the Appellant is also an improper attempt to raise on appeal that which formed no basis for the lower court's decision. Moreover, this last issue raised by the Appellant has no merit and improperly seeks to use these proceedings to expand the authorities and applicability of *N.H.R.S.A.* §§ 107-A et seq. and *N.H.R.S.A.* §§ 107-B et seq. beyond that granted or contemplated by the legislature and properly reserved to that body.

By raising this issue on Appeal, the Appellant, as recognized by the lower court, contends that in challenging the applicability of *N.H.R.S.A.* § 231-160 et seq., the Appellee is seeking to exercise local authority to prohibit the state from implementing a nuclear emergency response plan as required under *N.H.R.S.A.* §§ 107-A et seq. and *N.H.R.S.A.* §§ 107-B et seq. The Appellant cites authority for the proposition that municipalities cannot exercise veto power order the state's performance of its statutorily mandated functions. The lower court accurately exposed the flaw in the Appellant's argument in that the action taken by the Appellee is solely directed to the Appellant, Public Service Company, and not against the State of New Hampshire. Furthermore, as the lower court also explained, the state was not, in authorizing erection of the siren poles by the Appellant, exercising a statutorily mandated function. Rather, in so acting it was

relying on the presumed legislative authority of N.H.R.S.A. §§ 231-160 et seq. As the lower court correctly determined, this statute does not authorize erection of siren poles for this purpose.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT AS A MATTER OF LAW IN RULING THAT N.H.R.S.A. § 231:160 DID NOT APPLY TO POLES WITH ATTACHED SIRENS TO BE USED AS PART OF A PUBLIC EMERGENCY SYSTEM.

The trial court was entirely correct in holding that *N.H.R.S.A.* § 231:160 (1982 & Cum. Supp. 1986) provides no authority for the erection of siren poles for a system of public notification, and that the licenses granted to the Appellant, the Public Service Company of New Hampshire by the Appellee, Town of Rye and by the State Department of Transportation for the erection of such siren poles were thus null and void.

First, the court correctly concluded that the poles at issue did not even fall within the provision of *N.H.R.S.A.* § 231:160 authorizing the installation of certain poles. That particular statutory provision specifically lists, and thereby manifests an intent to limit, the types of poles to be included within the scope of the statute. Noticeably absent from the list is any reference to poles which are sought to be installed as part of a public emergency system. The specific listing of types of poles covered, and the fact that no catchall category was created, reinforces the conclusion that the legislature clearly intended the list set forth in the statute to be exclusive.

Secondly, the court correctly applied the well-established principle of statutory construction that "the expression of one thing in a statute implies the exclusion of another." *In re Gamble*, 118 N.H. 771, 777 (1978). In other words, where things to which a statute refers are designated, "there is an inference that all omissions should be understood as exclusions." 2A J. Sutherland, *Statutes and Statutory Construction*, § 47.23 at 194 (C. Sands 4th ed. 1984); (footnotes omitted); *see also Silva v. Botsch*, 120 N.H. 600 (1980) (where state specifically listed reasons that might result in removal of a selectman/board member, removal for other than one of enumerated reasons was found to be violative of the statute); *Vaillancourt v. Concord General Mutual Insurance Co.*, 117 N.H. 48 (1977) (the fact that the legislature specifically excluded mobile homes and home trailers but not snowmobiles from the definition of "motor vehicle" supported the conclusion that a snowmobile was a motor vehicle within the statutory definition).

Properly applying that statutory maxim to the case before it, the lower court noted that in *N.H.R.S.A.* § 231:160 the legislature provided a very specific and limited enumeration of the uses for which poles may be erected on public highways. Moreover, the court indicated that the statute contains no terms indicating the nonexclusivity of the list, such as "such as," "like", or "including but not limited to." Undoubtedly, it would have been easy enough for the legislature to have amended the statute so as either specifically to include the erection of siren poles within the scope of authorized action, or to have left open the possibility of its inclusion by indicating that the list enumerating the uses for which

the poles might be erected was not exclusive. The lower court was correct in concluding that the legislature did not intend to permit the erection of poles by utility companies for any purpose for which the companies might see fit, but rather confined the statute's scope to only those purposes listed. Consequently, the licenses granted to the Appellant for the erection of siren poles for a system of public notification were granted without any statutory authority and thus were null and void. Any other conclusion would have been untenable in light of the rule of statutory construction and the current version of *N.H.R.S.A.* § 231:160.

Third, the lower court was justified in finding that the legislative history of *N.H.R.S.A.* § 231-160 further supported its conclusion. As the court noted, § 231:160 has been amended several times to accommodate technological innovations such as telephones, television, electric lights and electric power. With each amendment intended to update the statute the legislature has specifically listed a particular innovation as a permissible use for utility poles. Rather than using broad language to provide for the inclusion of future innovations or societal needs in general, the legislature has carefully tailored the statute to provide specifically for each new use. It is clearly beyond the role of the court to accommodate any other new uses where the legislature has intentionally refrained from doing so itself.

Even if, *arguendo*, the list were not intended by the legislature to be exclusive, the poles in the instant case and the use to which they are sought to be put still do not fall within the permissible scope of uses intended by *N.H.R.S.A.* § 231:160. The Appellant, Department of

Transportation, contends that the siren poles constitute utility poles, as § 231:150 applies to a broad range of utility-type facilities. This argument is ill conceived as it rests on what is claimed to be the general nature of the statute, while wholly disregarding the specificity of language employed by the legislature. A careful reading of the statute demonstrates that, with the exception of electric light poles, the poles designated in the statute are all utility poles and are all employed to provide direct service to the public. Each transmits some service to the homeowner. The siren poles, however, are clearly distinct from the utility poles in that the former do not provide any direct service to the public. Because of this important distinction, the Appellant, Department of Transportation's reliance on *King v. Town of Lyme*, 126 N.H. 279 (1985) and *Parker-Young Co. v. State*, 83 N.H. 551 (1929), is misplaced. *King* involved a conflict over an electric power line utility easement; *Parker-Young*, in turn, involved two utility companies competing to provide electric power service to the same area. Unlike the electric power poles in both *King* and *Parker-Young*, the siren poles in the instant action do not constitute utilities in even the most remote sense of the word. Although the Appellant contends that siren poles do relate to the transmission of electricity, that relationship is far too attenuated to warrant characterization of such poles as utility poles.

Furthermore, the Appellant's contention that the siren poles are merely utility poles to which sirens have been attached ignores the obvious and important differences between the two. Siren poles are distinct from utility poles not only in their significantly greater size but also in the purpose they serve. Unlike a utility pole, the

sole purpose of a siren pole is to provide a siren/public address system as part of an evacuation plan in the event of a nuclear accident at Seabrook Station.

The Appellant, Department of Transportation's attempt to characterize siren poles as structures within the meaning of *N.H.R.S.A.* § 231:160 is equally unavailing. The Department placed undue emphasis on what it perceived to be general language in the statutes describing the types of facilities subject to licensing. It is a well-established principle that unless an act as a whole indicates a different purpose, the general words which follow specific words in an enumeration are construed to embrace only objects similar in nature to those enumerated by the preceding specific words. *Hackett v. Gale,* 104 N.H. 90, 92 (1960) (where specific, learned professions were listed in a zoning ordinance allowing for accessory use of residences, the term "others" which followed the list did not include a real estate brokerage which was regarded as a business rather than a profession); *State v. Small,* 99 N.H. 349 (1955). In the present action, the term "structures" which follows an enumeration of specific types of utility poles must be construed with the same specificity and be confined to include only those structures other than poles which are utilized by the same, specifically enumerated utility facilities. In this sense, siren poles cannot logically be characterized as "structures" included in § 231:160.

Finally, as noted by the lower court, the sirens can hardly be termed "appurtenances" within the scope of *N.H.R.S.A.* § 231:160. Unlike appurtenances, which refer to subordinate or adjunct parts, the sirens, which themselves are about six feet tall and weigh about 500 pounds

each, are the primary and most important features of the poles. The sirens are essential to the sole purpose of the poles in providing a siren/public address system. Any attempt to minimize their importance by relegating them to the status of appurtenances cannot be condoned.

The Appellant, Public Service Company, further contends that the lower court erred in disregarding the interpretation of *N.H.R.S.A.* § 231:160 given to it by the Department of Transportation, in which the Department considered the siren poles to be analogous to poles used for transmission lines. The Appellant cites the case of *N.H. Retirement System v. Sununu*, 126 N.H. 104 (1985) for the proposition that an agency's interpretation of a statute is entitled to substantial deference. The Appellant, however, fails to point out that the *Sununu* court also recognized that a long-standing administrative statutory interpretation is irrelevant if such interpretation is in conflict with the express statutory language. Likewise, where an agency offers a construction which is unsupported by the language of the statute, there is no need for the legislature to have amended the provision, as the statute speaks for itself and the error is apparent without need for such action. *See Hambry v. Adams*, 117 N.H. 606 (1977) (the interpretation given to a statute by the Department of Unemployment Security was not found to conform to legislative intent where the Department did not show any statutory language which would support its conclusion). The rule that, where a statute is of doubtful meaning, the long-standing practical and plausible interpretation applied by the agency charged with its implementation without any legislative interference is evidence that the administrative construction is in accordance with

legislative intent, does not apply where, as here, the meaning of the statute in issue is not in doubt. *See State Employees' Association of New Hampshire, Inc. v. State,* 127 N.H. 565 (1986) (even though some legislators had an intent that ran counter to the statutory language actually enacted, that would not create the uncertainty of statutory meaning necessary to justify an inquiry beyond the face of the statute itself). Furthermore, while an administrative interpretation of a statute may be entitled to deference, it is not ordinarily controlling. *N.H. Department of Revenue Administration v. Public Employment Labor Relations Board,* 117 N.H. 976, 977 (1977).

In the instant action, the interpretation of N.H.R.S.A. § 231:160 by the Department of Transportation is not entitled to substantial deference. The Department's interpretation, in which it considered the siren poles to be analogous to electric power poles or structures with sirens as attachments and appurtenances within the meaning of the statute, is neither supported by nor in conformity with the express statutory language. Rather, the language of the statute which expressly enumerates the uses for which poles may be erected on public highways, fails to mention poles to be installed as part of a public emergency system. Furthermore, no catch-all category exists pursuant to which the siren poles could be construed to be included. Thus, there is no reason to believe that the list is other than exclusive.

The Department's interpretation of the statute – allowing the poles at issue to be treated as analogous to electric power poles or structures with sirens as attachments and appurtenances – ignores the obvious and important differences between the poles. As has already

been discussed, the siren poles provide no direct service to the public, are significantly taller than utility poles, and serve only to provide a siren/public address system in the event of a nuclear accident. The sirens themselves can hardly be considered mere attachments or appurtenances, as they themselves are the most essential feature of the pole in providing a notification system.

In light of the foregoing, the Appellant's argument that the lower court erred in failing to give due regard to the Department of Transportation's interpretation of the statute is rendered ineffectual. Given the express enumerations set forth in the statute, the meaning of the statute at issue is anything but doubtful so as to require a court to resort to an agency's interpretation. The scope of uses authorized is explicitly established by the language of the statute. The interpretation given to it by the Department is clearly in conflict with such language and is unsupported by any fair reading of the statute. Consequently, the court was correct in applying its own interpretation of the statute as there is no evidence that the Department's construction of the statute in equating siren poles with utility poles is compatible with the legislative intent or is otherwise controlling. As the Department's interpretation is clearly unreasonable, it may be set aside. *State Employees' Association of New Hampshire, Inc. v. State. supra,* demonstrates that even an agency's long-standing interpretation may be overridden where it is shown to be in conflict with the statute it purports to interpret.

Public Service Company of New Hampshire also contends that the lower court adhered to an unduly restrictive scope for § 231:160 and calls for a more flexible

application of the statute as a whole. However, the specific language of the statute and its legislative history requires a restrictive reading, justifies the lower court's distinction between siren and electric or other utility poles, and supports its exclusion of siren poles from the class of utility facilities which may be installed on public highways.

II. APPELLANT'S SECOND ARGUMENT IMPROPERLY ATTEMPTS TO RAISE ON APPEAL AN ISSUE NOT RAISED OR LITIGATED IN THE PROCEEDINGS BELOW AND SEVERELY MISCHARACTERIZES THE PROCEEDINGS BELOW.

It is a well-established rule of appellate procedure in New Hampshire that the supreme court will not consider a question or argument presented for the first time on appeal. Thus, issues or questions not raised at trial cannot be raised or relied upon on appeal to the supreme court. *American Legion Post No. 94 v. Jefferson Insurance Co. of New York*, 125 N.H. 758 (1984); *Daboul v. Town of Hampton*, 124 N.H. 307 (1983); *Nowell v. Union Mutual Fire Ins. Co.*, 119 N.H. 855 (1979); *Sperl v. Sperl*, 119 N.H. 818 (1979); *Hauser v. Calawa*, 116 N.H. 676 (1976).

The Appellant, Public Service Company, raises an issue in its question presented number two which was neither raised nor litigated in the proceeding before the superior court. Allowing this question to be raised now on appeal would be improper, as it would usurp the primary function of the superior court and require the Town of Rye to argue an issue not raised in the proceeding below and which did not serve as a basis for the

lower court's decision. Adherence to proper appellate procedure dictates that the supreme court not consider this question raised for the first time on appeal. Even if, *arguendo*, the supreme court did entertain this question, it is clear that the Appellant's second argument is misleading, as it mischaracterizes the proceedings below.

First, contrary to the Appellant's assertion, the Appellee Town of Rye did not "revoke or refuse to issue permits for utility installations under *N.H.R.S.A.* §§ 231:159 et seq. As has already been established, the siren poles at issue in the present case do not constitute utility installations within the context of *N.H.R.S.A.* §§ 231:160 et seq. A careful reading of § 231:160 demonstrates that the statute does not apply to siren poles installed as part of a public alerting and notification system at Seabrook Station. The poles in question are distinct from customary utility poles in that the former are approximately 25-30 feet taller, carry no lines for the transmission of utilities, provide no direct service to the public, and have affixed to them a six-foot, 500-pound siren. Furthermore, the poles at issue cannot fairly be characterized as structures with sirens as attachments or appurtenances within the language of § 231:160. As the siren poles do not on any basis qualify as utility poles, structures, or facilities, it can hardly be said that the Appellee revoked or refused to issue permits for utility installations under *N.H.R.S.A.* §§ 231:159 et seq. Such an argument completely misconstrues the Appellee's actions in regard to the Appellant's application.

Second, the Appellee's refusal to issue permits to the Appellant Company was based on its objective determination that, pursuant to the Appellee's plan, town

residents could not safely be evacuated in the event of emergencies at the Seabrook station in instances of even moderate releases of radiation. Also, the proposed installation of siren poles would create a false sense of safety, and mass hysteria among the town residents would likely result in the event of an emergency when the ineffectiveness of the proposed evacuation plan would become apparent.

The Appellee's refusal to issue permits for the installation of said poles and sirens as part of a nuclear emergency response plan was clearly valid as an exercise of its well-recognized police powers. Under *N.H.R.S.A.* § 31:39, towns are afforded the authority to make bylaws for a number of purposes, including the carrying on of their "prudential affairs." This provision gives to towns and municipalities the authority to exercise police powers in the general areas of public health, safety and welfare. *Town of Freedom v. Gillespie,* 120 N.H. 576, 579 (1980) (town ordinance requiring that septic tanks be constructed at least 125 feet from any body of water upheld on basis of the town's police powers); *Piper v. Meredith,* 110 N.H. 291, 298 (1970) (town's exercise of its police powers in an ordinance regulating the height of buildings within the town must be upheld if supported by any fair reason; *State v. Zetterberg,* 109 N.H. 126, 129 (1968) (ordinance enacted by the Town of Rye regulating surfing in the waters off the town's shore was a proper exercise of the town's police powers in the area of public health and safety). In light of the false sense of security likely to have been engendered by the erection of poles and sirens, the Appellee reasonably concluded that its approval of the installation system could result in posing a serious

threat to the life, health, and property interests of its residents in the event of a nuclear accident.

New Hampshire case law clearly indicates that, under its police powers, a municipality has broad authority to take action in matters affecting the public health, safety, and welfare. In view of these established powers, the Appellee's refusal to approve the installation of poles and sirens within the municipality must be upheld as an appropriate exercise of this power. *See Piane v. Town of Conway*, 118 N.H. 883, 884 (1978) (town ordinance restricting number of street vendors in heavy traffic areas proper exercise of police powers); *Town of Plainfield v. Hood*, 108 N.H. 502, 506 (1968) (ordinance restricting number and locale of mobile homes within town valid as protecting public health, safety, and welfare); *Town of Deering ex rel. Bittenbender v. Tibbetts*, 105 N.H. 481, 484 (1964) (town ordinance restricting construction of buildings near town common valid exercise of police power in view of purpose of preserving historic buildings and protecting general welfare and prosperity of town).

The one permit issued by the Appellee for three of the poles in question was properly revoked because the Appellant Public Service Company had obtained the permit by submitting an application customarily used for the installation of ordinary utility poles, thus misleading the Appellee by concealing the fact that the pole license was being sought as part of the implementation of a nuclear emergency plan. The Appellant failed to follow the proper procedure in that such license applications are to be submitted to the Board of Selectmen. Instead, the Appellant improperly submitted the application to the Town Clerk, thus preventing proper consideration from

being given to the license application. Knowing that the Town of Rye had repeatedly, consistently and unequivocally objected to the installation of 60-foot poles with sirens, the Appellant submitted its pole license application without any cover letter or explanation as to the purpose behind the application. Obviously, the Appellant intended to conceal its purpose in seeking the license. The issuance of this license, based upon the Appellant's deceit, was without force and effect, and thus the Town of Rye had every right to revoke that which it issued in error and under circumstances for which it found Public Service Company of New Hampshire culpable.

The Appellee's revocation of the license, based as it was upon the health and safety of its residents, was entirely proper. 64 *C.J.S.*, "Municipal Corporations" § 1740(3) (1950). Clearly, the municipality's police powers in the area of public health and safety take precedence over the Appellant's interests as a licensee. The predominance of the local health and safety over a utility's interest as a licensee is well illustrated by the established rule that utilities with properly licensed facilities (i.e. lines, poles, etc.) located on or beneath public property are required to relocate such facilities at their own expense when the public health and safety require. *Manchester Gas Co. v. Griffin Construction Co.*, 119 N.H. 179 (1979); Opinion of Justices. 101 N.H. 527 (1957).

In the present case, the Appellee's actions in revoking the Appellant's license were based on the Appellee's belief that the erection of such poles on town property as part of the implementation of a nuclear emergency response plan was not in the best interests of its residents. The municipality's interest in promoting the public

health and safety clearly takes precedence over any interest the Appellant might have had as a licensee. Under the exercise of its police powers, therefore, the Appellee was empowered to revoke the Appellant's license. The Appellee did not revoke or refuse to issue the permits merely because it did not want such installations in the Town or solely because it opposed the project with which the installations were associated, as the Appellant contends.

III. APPELLANT'S ASSERTION THAT BY CHALLENGING THE APPLICABILITY OF *N.H.R.S.A.* § 231:160 ET SEQ., THE APPELLEE SOUGHT TO EXERCISE LOCAL AUTHORITY TO PROHIBIT THE STATE FROM IMPLEMENTING A NUCLEAR EMERGENCY RESPONSE PLAN IS CLEARLY ERRONEOUS AND IS AN IMPROPER ATTEMPT TO RAISE ON APPEAL AN ISSUE WHICH FORMED NO BASIS FOR THE LOWER COURT'S DECISION.

The third issue presented by the Appellant Public Service Company is also an improper attempt to raise on appeal that which formed no basis for the lower court's decision. The Appellant itself recognized that the lower court found for the Appellee on the ground that the poles in question were not within the class of installations authorized, and therefore, the licenses for the poles had been issued without statutory authority and were null and void. (Attachment to Notice of Appeal, Record pp. 6-7). The third issue raised by the Appellant has no merit and improperly seeks to use these proceedings to expand the authorities and applicability of *N.H.R.S.A.* §§ 107-A et seq. and *N.H.R.S.A.* §§ 107-B et seq. beyond that granted or contemplated by the Legislature and properly reserved to that body.

In trying to raise this specific issue on appeal, the Appellant, as properly recognized by the lower court, contends that by challenging the applicability of *N.H.R.S.A.* §§ 231-160 et seq., the Appellee Town of Rye is seeking to exercise local authority to prohibit the state from implementing a nuclear emergency response plan as required under *N.H.R.S.A.* §§ 107-A et seq. and *N.H.R.S.A.* §§ 107-B et seq.

The lower court correctly observed that the Appellant Public Service Company's reliance on the asserted applicability or *Vernet v. Exeter*, 128 N.H. (December 30, 1986), to the instant action is clearly misplaced. Appellant cited *Vernet* for the proposition that municipalities cannot exercise veto power over the state's performance of its statutorily mandated functions. The lower court exposed the flaw in the Appellant's argument in that the action taken by the Appellee is solely against the Appellant, Public Service Company of New Hampshire, and not against the State of New Hampshire. As it is the Appellant company, rather than the state, which has taken the action which the Appellee seeks to enjoin, *Vernet* is inapplicable to the instant facts. As the lower court also explained, the State Department of Public Works and Highway (now the Department of Transportation), in authorizing erection of the siren poles by the Appellant, was not exercising a statutorily mandated function. Rather in so acting it was relying on the presumed legislative authority of *N.H.R.S.A.* § 231:160 et seq. which as the lower court correctly determined, does not authorize the erection of siren poles for this purpose.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's decision.

Oral argument will be presented by J.P. Nadeau who respectfully requests 20 minutes.

Respectfully submitted,
Town of Rye
By its Attorneys
J.P. Nadeau, Esquire

Dated: September 2, 1987
By: /s/ J.P. Nadeau

J.P. Nadeau, Esquire
Attorney for the Appellee
Town of Rye
Nadeau Professional Offices
507 State Street
Portsmouth, NH 03801
(603) 436-0110

CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of September 1987 forwarded a copy of the foregoing to Margaret H. Nelson, Esquire, Michael J. Walls, Assistant Attorney General, Robert A. Backus, Esquire and Raymond Taylor, Clerk, Rockingham County Superior Court (2 copies)

/s/ J.P. Nadeau
J.P. Nadeau

APPENDIX B TO
BRIEF OF PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE NEW HAMPSHIRE SUPREME COURT

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

1987 TERM
AUGUST SESSION

No. 87-062

Town of Rye and Town of Hampton Falls

v.

Public Service Company of New Hampshire
and the State of New Hampshire
Department of Transportation

MOTION FOR RECONSIDERATION

J.P. Nadeau, Esquire
Attorney for the Town
Of Rye
Nadeau Professional Offices
507 State Street
Portsmouth, N.H. 03801
(603) 436-0110

Pursuant to *N.H. Sup. Ct. R.* 22, the Town of Rye, Appellee in these proceedings, respectfully moves this Honorable Court to reconsider its decision of March 29, 1988. The Town of Rye respectfully suggests that the court has overlooked and misapprehended several points

made in the proceedings below, which points are more particularly described within the body of this Motion.

STATEMENT OF FACTS

The Public Service Company of New Hampshire (hereinafter PSCNH) is a private electric utility company and controlling partner in the construction of the Seabrook Nuclear Power Station. On or about November 7, 1983, PSCNH contacted the Town of Rye regarding PSCNH's proposal to install a public alerting system. From the time of the initial proposal to the present, the Town of Rye has consistently opposed the proposal.

On July 9, 1984, PSCNH submitted an application for a pole license to the town clerk of Rye. The application was submitted with no cover letter and with no explanation of the purpose to which the poles would be put (Tr. 22, 27, 37, 101) (all references to transcript are to the hearing of November 13, 1986). Subsequently, a separate application was submitted to the State of New Hampshire for poles with attached sirens to be placed on various state-maintained roads in the towns of Rye and Hampton Falls.

In September 1984, an official of the Appellee Town signed the Appellant's pole license application after it had been routinely processed and the State Department of Transportation gave its permission to the Appellant Company to install the poles. On November 7, 1985, the Appellant Company began installing four poles with attached sirens on state right-of-ways within the municipality and installed two of the three remaining poles on municipal property. The poles are approximately 60 feet

in height (as opposed to a utility pole of 35 feet in height) (Tr. at 90, 109-10) and affixed to the top of each pole is a 6-foot, 500-pound siren/public address system (Tr. 108, Appendix to Appeal 113) (references to Appendix are to Appendix to Notice of Appeal). The Town of Rye, on November 20, 1985, issued a cease and desist order against the Appellant Company's actions in installing the poles and revoked the pole license which had been issued by the Appellee to the Appellant (Tr. 47). The Appellee also advised the Appellant that the installation of any poles for the purpose of attaching sirens to the poles was unacceptable to the Appellee.

After the Appellant refused to obey the cease and desist order issued by the Appellee, the Appellee instituted an action for declaratory relief against the Appellant Company (Appendix to Appeal at 17-19). Specifically, the Appellee sought an order allowing it to revoke the pole license it had granted to the Appellant to install poles on town-maintained rights-of-way and also sought removal of certain poles installed within the town limits on state-maintained highways under licenses issued by the state. The Town of Hampton Falls was permitted to intervene to similarly seek removal of poles located in the town on state-maintained highways. Following a hearing on November 26, 1986, the court determined that the state of New Hampshire Department of Transportation (DOT) was a necessary party for the resolution of the dispute and ordered the DOT to file responsive pleadings (Appendix to Appeal at 87-91, 112).

By order dated January 20, 1987, the superior court, Walter L. Murphy presiding, ordered removal of the

poles and the siren/public address systems at the Appellant's expense within 30 days of the order (Appendix of Appeal at 112-18). The sole ground on which the superior court justice based his decision was the fact that the poles and sirens in question were found not to be in the class of utility facilities, installations, or structures within the meaning of *N.H. Rev. Stat. Ann.* §§ 231-160 et seq. In ruling in favor of the Appellee, the trial court held that the poles in question were not "telegraph, television, telephone, electric light and power poles" within the meaning of the statute. The trial court noted the exclusivity of the list of authorized uses enumerated in § 231:160 and the fact that the use of poles as part of a public emergency system was not included within the statute's coverage. Thus, the court held that the licenses granted by the Town of Rye and by the State Department of Transportation for the erection of poles for a system of public notification were granted without statutory authority and were, therefore, null and void.

On appeal, the Supreme Court of New Hampshire reversed the judgment of the trial court.

ARGUMENT

I. THE COURT HAS MISAPPREHENDED POINTS OF LAW AND FACT MADE BY THE TOWN OF RYE AND IMPROPERLY HELD THAT THE LICENSES WERE GRANTED PURSUANT TO PROPER STATUTORY AUTHORITY AND THAT THE POLES ERECTED SHOULD NOT BE REMOVED.

The Town of Rye respectfully suggests that the court has misapprehended certain of its points regarding the

lack of authority to issue the pole licenses at issue. The Town moves the Court to reconsider these points.

This Court has held in this case that *N.H. Rev. Stat. Ann.* § 231:161, VI, "made it unnecessary for our legislature to amend the statute to specifically permit siren poles" (Decision of the court, March 29, 1988). The court has also found that sirens are "attachments" within the meaning of *N.H.R.S.A.* §§ 231:160 and 231:161, VI. The Town requests reconsideration of each of these findings.

N.H.R.S.A. § 231:160 does authorize the installation of certain poles. Yet, that provision specifically lists the types of poles which are included within its terms. The list omits reference to any type of public emergency system. Clearly, this function does not fall within the scope of the statute. Moreover, "the expression of one thing in a statute implies the exclusion of another." *In re Gamble,* 118 N.H. 771, 777 (1978). Had the legislature wished to include this function within the statute's terms, it would have done so.

The "attachments" mentioned in *N.H.R.S.A.* § 231:160 relate only to the enumerated, permitted poles. Where "public emergency system" poles are not permitted, it is improper to assert that such functions may be accomplished pursuant to the "attachment" provision. Unless an act specifically indicates a different purpose, general words following the specific words in an enumeration are properly construed to include only objects similar to those enumerated. *Hachett v. Gale,* 104 N.H. 90, 92 (1960). Where the "emergency alert" function is not included in the enumeration of permitted poles, it cannot be later

inserted through construction of the "attachment" provision.

It is clear that the "alert" function was not intended to be included in the enumeration of permitted poles. Importantly, as was noted by the trial court, the statute contains no words or phrases which might indicate the nonexclusivity of the list, such as "such as," "like," or "including, but not limited to." Had the legislature desired the statute to be so interpreted, it would have so indicated.

Instead, the use of these poles for emergency alert systems was not included by the legislature. The legislature has considered several technological developments – including telephones and electric power – and amended the statute to accommodate each of these new requirements. However, the legislature has refused to specifically provide for public warning systems in this statute. It has thus made clear the fact that the statute does not address such uses.

By its March 29, decision, the court would add such a function to the list of permitted poles. It thus would seek to create new laws and thus to legislate. In fact, such an act of legislation would be in contravention of the intent of the legislature. By doing so, it would violate an important canon of constitutional law, that of separation of powers. This canon is set out in this state's Bill of Rights:

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as in consistent with that chain of connection that binds the whole fabric of the

constitution in one dissoluble bond of union and amity.

N.H. Const. pt. 1, art. 37.

It is well-settled that "(t)he separation of powers requirement of the constitution is violated by an improper imposition upon one branch of constitutional duties belonging to another or an encroachment by one branch upon a constitutional function of another." *State v. La France,* 124 N.H. 171 (1983). No court may alter a legislature's intent by its own acts of legislation.

Even if, *arguendo,* the list included in the statute were not intended to be exclusive, the poles in the case at bar still do not fall within the scope of uses permitted by *N.H.R.S.A.* § 231:160. With the exception of electric light poles, each pole enumerated by the act transmits some service to homeowners. The siren poles provide no such service. Siren poles, thus, do not fall within the purview of legislative intent. The court may not tread upon the providence of the legislature by creating law contrary to the legislative intent.

II. THE COURT HAS MISAPPREHENDED THE TOWN'S POINTS REGARDING THE ROLE OF THE COMMUNITY WITH RESPECT TO THE EVACUATION PLAN.

The decision of the court refers to local attempts to "veto" evacuation plans developed by the civil defense agency. It also declares an inability on the part of the communities "to prohibit either cooperation by selectmen with radiological emergency response planning . . . or construction . . . of any installations necessary for the

implementation of a RERP" (Decision of the court, March 29, 1988 at 4). Because the court has misunderstood the activities of the community, the Town of Rye respectfully moves the court to reconsider its holdings.

The Town has never attempted to assert any "veto power" or absolute control over the existence of an evacuation plan. The Town's objection to the plan is directed against the Public Service Company of New Hampshire and not against the State of New Hampshire. The Town of Rye has objected to the specific plan offered by PSCNH, on the basis of its obligations to protect its citizens. The Town is concerned with such matters as a safe and orderly traffic flow in the event of evacuation and the provision of emergency services to those injured, perhaps in traffic, while in the process of evacuation.

Contrary to the observation of the court, the Town has consistently articulated such safety-related reasons for its opposition (see, for example, Tr. 28-29 and Brief on Appeal, Town of Rye, at 19). The Town maintains that the above-stated goals fall within the authority of local communities and that the Town may properly seek to participate in the planning process by the protection of those goals. *Public Service Company of New Hampshire v. West Newbury*, 835 F.2d 380 (1st Cir. 1987); in fact, absent any affirmative interference amounting to a regulating of nuclear power, the Town may refuse cooperation with a particular proposal. *Citizens For An Orderly Energy Policy, Inc. v. Suffolk County*, 604 F. Supp. 1084 (E.D.N.Y. 1985). No state statute denies communities this important right of participation in the nuclear planning process. The Town further maintains that, based on its misapprehension of the above facts, the court incorrectly concluded

that no safety reasons existed to authorize a license revocation or the denial of an application for a license.

CONCLUSION

Based on the foregoing Argument, the Town of Rye respectfully suggests that the court has misapprehended and/or overlooked points of fact and of law which are crucial to the disposition of this case; the Town moves the court for reconsideration of this matter.

Respectfully submitted,

/s/ J.P. Nadeau
J.P. Nadeau
Attorney for Appellee, the
Town of Rye
Nadeau Professional Offices
507 State Street
Portsmouth, N.H. 03801

CERTIFICATE OF SERVICE

I hereby certify that I have on this eighth day of April, 1988, mailed, first class postage pre-paid, a copy of the foregoing Motion for Reconsideration and a notice of filing to Margaret H. Nelson, Michael J. Walls, Assistant Attorney General, Robert A. Backus, and Raymond Taylor, Clerk, Rockingham County Superior Court. These materials have been hand-delivered to Ralph Wood, Clerk, New Hampshire Supreme Court.

/s/ J.P. Nadeau
J.P. Nadeau